

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001349-MR

MARK AARON EMBRY

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 02-CR-00371-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING AND REMANDING

** ** *

BEFORE: GUIDUGLI AND KNOFF, JUDGES; EMBERTON, SENIOR JUDGE.¹
GUIDUGLI, JUDGE. Pursuant to a conditional guilty plea, Mark Aaron Embry (hereinafter "Embry") has appealed from the Daviess Circuit Court's April 18, 2003, order denying his motion to suppress evidence seized during a warrantless search of his automobile. Having considered the parties' briefs, the record and the applicable case law, we must reverse and remand.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On September 4, 2002, the Daviess County Grand Jury indicted Embry and Christopher Allen McClure (hereinafter "McClure") on one count of Burglary in the First Degree² for entering and remaining unlawfully in the residence of Gary Bivins in Philpot, Kentucky, on July 5, 2002, while armed with a deadly weapon. Embry was also charged with being a Persistent Felony Offender in the Second Degree.³ Embry and McClure filed a motion pursuant to RCr 9.78 to suppress evidence obtained in the search of Embry's vehicle by the Tipton County, Tennessee, Sheriff's office. The circuit court held a suppression hearing on March 26, 2003.

At the suppression hearing, Deputy Daniel Walls of the Tipton County Sheriff's office (hereinafter "Deputy Walls") testified that he observed a Black Camaro with Kentucky license plates weaving in and out of its lane on Highway 51 in Tipton County, Tennessee.⁴ Deputy Walls stopped the vehicle at 10:38 p.m. local time based upon the weaving to determine whether the driver was under the influence of an intoxicant or was experiencing a medical problem. He approached the driver's side and began a conversation with Embry, the driver. McClure was a passenger in the vehicle. During this conversation, Embry indicated that he was tired from driving and that he and McClure

² KRS 511.020.

³ KRS 532.080.

⁴ Tipton County is located approximately thirty miles north of Memphis, Tennessee.

were on the way to California for a wedding. Another responding officer indicated to Deputy Walls that McClure reported that they were on the way to Las Vegas, Nevada, and that they had just left a wedding in Kentucky.

Deputy Walls did not detect any odor of an intoxicant, but had Embry exit the vehicle to give him the opportunity to stretch and wake up. Fifteen minutes later, Deputy Walls felt that Embry was sufficiently awake to be able to drive safely and was free to go, but never expressed this to Embry. Furthermore, Deputy Walls never returned Embry's driver's license. At 11:05 p.m., Deputy Walls decided to call for a canine unit to test for the presence of illegal drugs based upon his observations of Embry's lack of eye contact and his nervous behavior.

Additionally, Deputy Walls thought Embry was not acting like a reasonable person after being told he was stopped for being under the influence. Furthermore, Embry was anxious for Deputy Walls to issue him a ticket so that he could leave. Deputy Walls indicated that he was not going to issue a traffic ticket because Embry had not violated any statute. The drug dog arrived at 11:22 p.m. and alerted on the driver's side of the car. The vehicle was searched, and a gold pipe and marijuana were located and seized. At this point, the whole car was searched, and police recovered a brown purse with the identification of Gary Bivins and an income tax refund check

made out to Gary Bivins. Both Embry and McClure were arrested when a sawed-off shotgun was located.

Following the hearing, the circuit court made findings of fact and then denied the motion to suppress, holding that the period of time Embry and McClure were detained was not unreasonable under the circumstances of the case so that there was no violation of the 4th Amendment. The circuit court entered the following order on April 18, 2003, memorializing its oral ruling:

This matter having come to the Court's attention on Wednesday, March 26, 2003, on Defense Counsel's Motion to Suppress, the defendants being in Court and represented by the Hon. Rich Walls for McClure and the Hon. Evan Taylor for Embry, the Court having heard testimony from Deputy Daniel Walls of the Tipton County, Tennessee Sheriff's Office and from each defendant and after having heard arguments of counsel FINDS AS FACTS as follows:

1. That on July 5, 2002 at approximately 10:38 p.m. in Tipton, County, Tennessee, Deputy Daniel Walls of the Tipton County Sheriff's Office observed a motor vehicle operated by the defendant, Mark Aaron Embry, weaving in and out of both lanes on a highway with five to seven other cars in the immediate area.

2. That Deputy Walls had duty or obligation to make a traffic stop on the vehicle operated by Embry, and occupied by McClure as a front seat passenger.

3. That upon making the traffic stop, Deputy Walls noticed that the defendant driving, Mark Aaron Embry, had bloodshot

eyes and was mumbling and that Embry stated to the officer he was tired.

4. That it was reasonable under the circumstances for Deputy Walls to ask the defendants to step out of the motor vehicle, to ascertain whether the defendant was intoxicated and after determining within 15 minutes of the stop that the defendant was not intoxicated the deputy was still concerned for the defendant's safety and the safety of others on the road due to Embry's assertion that he was tired and continued to engage in conversation with the defendant and thereby continued to observe his condition, and realized that the defendant, Embry, and passenger, McClure gave inconsistent responses to questions and further that defendant, Embry, was evasive in his responses and his mannerisms were unusual and that Deputy Walls testified he has five years experience as a police officer and that he has made over 5,000 traffic stops and that the defendant, Embry, was unusually nervous as compared to the other traffic stops.

5. That from the initial traffic stop until the drug dog arrived, 44 minutes had elapsed, but that based upon the totality of the circumstances, Deputy Walls did not obtain reasonable suspicion until 15 - 20 minutes after the stop that the defendants were engaged in drug/criminal activity and at that point requested a drug dog to come to the scene which arrived within 15 - 20 minutes thereafter which is not unreasonable under this case scenario.

6. The Court finds that the detention of the defendants was reasonable and not violative of the Fourth Amendment and once the certified and trained drug dog hit on the automobile, Deputy Walls then had probable cause to search the entire vehicle.

Based upon the above finding of fact,

IT IS HEREBY ORDERED AND ADJUDGED that
Defense Counsels joint motion to suppress be
and is hereby OVERRULED in its entirety.

Following the entry of this order, Embry moved the circuit court to enter a conditional guilty plea on an amended charge of Burglary in the Second Degree, with his persistent felony offender charge being dismissed. The circuit court accepted his conditional guilty plea, and on June 16, 2003, entered a judgment to that effect and sentenced him to eight years in the penitentiary in accordance with the plea agreement. This appeal followed.

On appeal, Embry argues that the warrantless search of his vehicle was illegal because it did not meet any of the accepted exceptions to the rule that searches must be accompanied by a warrant. Furthermore, the length of his detention was unreasonable and the facts did not support Deputy Walls' claim that he had a reasonable suspicion of criminal activity. On the other hand, the Commonwealth argues that Deputy Walls properly stopped Embry's vehicle because he was weaving in traffic, that the observations made by Deputy Walls provided him with enough suspicion of criminal activity to justify his calling in a drug dog for further investigation, and that the indication by the drug dog that drugs were present provided the probable cause to search the vehicle.

In reviewing the denial of a motion to suppress following a hearing, this Court must first determine whether the findings of fact are supported by substantial evidence. If so, those findings are conclusive. RCr 9.78; Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998). We must then perform a de novo review of those factual findings to determine whether the circuit court's decision is correct as a matter of law. Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); Commonwealth v. Banks, Ky., 68 S.W.3d 347, 349 (2001); Stewart v. Commonwealth, Ky., 44 S.W.3d 367, 380 (2000).

At the outset, we note that we agree with the Commonwealth that there is no question that the initial traffic stop was proper. In the interest of both the public's and Embry's safety, Deputy Walls was required to stop the vehicle to ascertain whether Embry was intoxicated or suffering from a medical problem. Furthermore, once the drug dog indicated the presence of drugs in the vehicle, sufficient probable cause existed to support a warrantless search. However, it is the period of time Embry was detained from Deputy Walls' determination that he was once again safe to drive to the call for the drug dog that is problematic in this case.

In Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968), the United States Supreme Court tested police

conduct under the 4th Amendment's proscription against unreasonable searches and seizures that it defined as "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat" which would not be subject to the warrant procedure. An officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 20-21, 20 L.Ed.2d at 905-06, 88 S.Ct. at 1880. The Terry Court's final holding was as follows:

[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such person in an attempt to discover weapons which might be used to assault him.

Terry, 392 U.S. at 30-31, 20 L.Ed.2d at 911, 88 S.Ct. at 1884-85. The 8th Circuit Court of Appeals later addressed this standard in United States v. Bloomfield, 40 F.3d 901, 918 (8th Cir. 1994), as related to traffic stops:

If, during a traffic stop, an officer develops a reasonable, articulable suspicion that a vehicle is carrying contraband, he has "justification for a greater intrusion unrelated to the traffic offense." [] [United States v.] Cummins, 920 F.2d [498,] 502 [(8th Cir. 1993)]. We assess the factors on which an officer based his claim of reasonable suspicion as a totality and in light of the officer's experience.

In United States v. Sharpe, 470 U.S. 675, 84 L.Ed.2d 605, 105 S.Ct. 1568 (1985), the Supreme Court addressed the difference between a de facto arrest and an investigative stop, noting that:

[O]ur cases impose no rigid time limitation on Terry stops. While it is clear that "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion," . . . we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. . . . Much as a "bright line" rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria. (Citations omitted.)

Sharpe, 470 U.S. at 685, 84 L.Ed.2d at 615, 105 S.Ct. at 1575.

As to the determination regarding whether a detention is too long, a court should consider, "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant," and that, "[a] court making

this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing." Sharpe, 470 U.S. at 686, 84 L.Ed.2d at 616, 105 S.Ct. at 1575. See also Bloomfield, 40 F.3d at 916-17. The United States Supreme Court has also identified "nervous, evasive behavior" as "a pertinent factor in determining reasonable suspicion." Illinois v. Wardlow, 528 U.S. 119, 124, 145 L.Ed.2d 570, 577, 120 S.Ct. 673, 676 (2000).

The courts in Kentucky have also addressed this issue. In Simpson v. Commonwealth, Ky.App., 834 S.W.2d 686 (1992), this Court addressed whether police had a legitimate reason to stop and question Simpson while he was standing on a street corner. The Court applied the Terry standard, in which "a police officer can subject anyone to an investigatory stop *if* he is able to point to some specific and articulable fact which, together with rational inferences from those facts, support 'a reasonable and articulable suspicion' that the person in question is engaged in illegal activity." Id. at 687. The Simpson Court also noted that, "the question of whether there is 'a reasonable and articulable suspicion' is a question of fact which must be determined in each situation from the totality of the circumstances." Id. At the time police stopped him, Simpson was observed walking back and forth on a sidewalk and into a

parking lot, in which large sign prohibiting trespassing and loitering was displayed. Simpson was observed again in the same location fifteen minutes later. Based upon the totality of the circumstances, the Court held that the police at that point were justified in approaching Simpson, asking him what he was doing, and asking for identification.

In Commonwealth v. Banks, Ky., 68 S.W.3d 347 (2001), the Supreme Court of Kentucky upheld a stop and frisk by police:

When Officer Bloomfield seized [Banks], he had reasonable suspicion to believe that [Banks] may be engaged in criminal activity. [Banks] was in a high crime area.[] He was present on the property of an apartment complex where a "No Trespassing" sign was posted. The officers did not recognize [Banks] as a resident of the complex with which they were familiar. The officers approached [Banks], and he appeared to be startled. [Banks] then attempted to turn and evade the officers by walking in the opposite direction.[] Then, after [Banks] took a few steps away from the officers, he instantly stopped. These facts justified the officers' belief that [Banks] may have been engaging in criminal activity. The fact that [Banks] took his hands out of his pockets and a bulge still remained in one pocket, gave rise to a reasonable belief that he may have been armed and dangerous. Under the totality of the circumstances, Officer Bloomfield was justified in stopping and frisking [Banks]. (Footnotes omitted.)

Id. at 350. See also Kotila v. Commonwealth, Ky., 114 S.W.3d 226, 232 (2003).

In the matter at bar, the circuit court's findings of fact were supported by substantial evidence of record, and are therefore conclusive. Therefore, we shall review the circuit court's decision to deny the motion to suppress de novo using those factual findings. We must disagree with the circuit court's conclusion that the length of time Embry was detained was reasonable under the totality of the circumstances.

We first observe that Deputy Walls properly stopped Embry after he observed his vehicle weaving in traffic and straddling both lanes of the highway. Deputy Walls quickly determined that Embry was not intoxicated, as he did not detect the odor of an intoxicant, or that he was suffering from a medical problem, but rather was tired. The stop occurred at 10:38 p.m., and in approximately fifteen minutes, Deputy Walls determined that Embry was sufficiently awake to drive safely. We also observe that at some point during their conversation, Deputy Walls asked for permission to search the vehicle, which Embry declined. At 11:05 p.m., Deputy Walls decided to call in a drug dog based upon his observations that Embry was avoiding eye contact, was overly nervous and was muttering and smoking heavily. Deputy Walls also observed that Embry's vehicle was overpacked, and that Embry was anxious to receive a ticket. Finally, Deputy Walls determined that Embry and McClure had somewhat different stories as to their destination.

Although Deputy Walls testified that Embry was at least initially free to leave, it is apparent from the record that this was not the case. Deputy Walls took Embry's driver's license and never returned it to him during the stop. Embry testified that he did not get his license back until he was in jail. Embry would not have been able to legally drive without his license, so that he was in fact detained for the whole period of time, including the time prior to which Deputy Walls thought criminal activity was afoot. Based upon the applicable case law, we cannot hold that Deputy Walls' continued detention of Embry was reasonable under the circumstances of this case. Embry was not in a high crime area or engaged in any apparent criminal activity when he was stopped. Deputy Walls himself testified that Embry had not broken any traffic laws and that he was not going to issue him a traffic ticket. There is no evidence that Embry tried to elude Deputy Walls or any of the other responding officers, there was nothing in plain view to establish criminal activity, and the statements Embry and McClure provided were not sufficiently different to reasonably raise suspicion. Therefore, the circuit court erred in denying the motion to suppress evidence.

For the foregoing reasons, the order of the Daviess Circuit Court denying Embry's motion to suppress is reversed,

and this matter is remanded for further proceedings in accordance with this opinion.

EMBERTON, SENIOR JUDGE, CONCURS.

KNOFF, JUDGE, DISSENTS.

KNOFF, JUDGE, DISSENTING: Respectfully, I dissent from the majority opinion. While I agree with much of the reasoning of the majority opinion, I disagree with the majority's conclusion that the police officers detained Embry for too long. In assessing whether a detention is too long in duration to be justified as an investigative stop, the courts must consider whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing. United States v. Sharpe, 470 U.S. 675, 686, 84 L. Ed. 2d 605, 616, 105 S. Ct. 1568, 1575 (1985). Furthermore, the question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it. Id. at 687, 84 L. Ed. 2d at 616, 105 S. Ct. at 1576. Although the current case is a close call, I believe that the

police officer's actions were reasonable under the circumstances.

As the majority correctly notes, there is no question that the initial traffic stop was proper. Likewise, Deputy Walls clearly had reasonable grounds to detain Embry until he determined that Embry was not intoxicated or presented a danger to the driving public. It is agreed that Deputy Walls made this determination within fifteen minutes of the stop. During this time, however, Deputy Walls observed that Embry was acting strangely - avoiding eye contact, muttering, and smoking heavily even while informing Deputy Walls that he was not a heavy smoker. He also noted that the vehicle appeared to be very heavily packed for two people. In addition, Deputy Walls learned that the passenger, McClure, had given another officer a somewhat different account of the reasons and destination for their trip.

Admittedly, none of these circumstances are illegal or necessarily suggest criminal conduct. However, they did provide Deputy Walls with reasonable and articulable grounds to suspect that something was amiss. The trial court noted that a total of forty-four minutes elapsed from the initial traffic stop until the drug dog arrived. This means that Deputy Walls detained Embry about twelve minutes from the time he made the determination that Embry was not intoxicated until he requested

that a drug-dog be brought to the scene. An additional seventeen minutes elapsed until another officer arrived with the drug dog. Thus, from the time Deputy Walls determined that Embry was not intoxicated until the dog arrived on the scene, a total of twenty-nine minutes had passed.

Based upon the facts presented in this case, I agree with the trial court that Deputy Walls had a reasonable and articulable suspicion to detain Embry even after he determined that Embry was not intoxicated. Furthermore, I would also find that Deputy Walls acted reasonably and diligently to investigate these suspicions. I agree that the length of the detention would be a significant inconvenience to any individual who has been stopped by the police under similar circumstances. Nonetheless, I find no indication that the length of the delay was unnecessary to the scope of a reasonable investigation. See also United States v. Avery, 137 F.3d 343, 350-352 (6th Cir., 1997); and United States v. Winfrey, 915 F.2d 212, 216-18 (6th Cir., 1990). Therefore, I would affirm the trial court's order denying the motion to suppress the evidence seized during the warrantless search of Embry's automobile.

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